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Before the
Federal Communications Commission
Washington, D.C. 20554

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JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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MM Docket No. 92-265

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Implementation of Sections 12 and 13
of the Cable Television Consumer
Protection and Competition Act of 1992

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Development of Competition and
Diversity in Video Programming
Distribution and Carriage

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**COMMENTS OF THE ATTORNEYS GENERAL OF TEXAS,
MARYLAND, OHIO, AND PENNSYLVANIA**

I. Introduction and Summary

The Attorneys General of Texas, Maryland, Ohio, and Pennsylvania ("the States") submit the following comments¹ to the Federal Communications Commission ("the Commission") concerning its Notice of Proposed Rulemaking on standards for the development of competition and diversity in video programming distribution and carriage pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act").

The inability of alternative distributors to secure programming has long impeded

¹ Representatives of the Offices of Attorney General of the four states submitting these comments are among the several members of the Cable Television Investigative Group ("the CTIG") specially appointed by the National Association of Attorneys General (NAAG) Multistate Antitrust Task Force. The CTIG has actively investigated the cable television industry since 1988. The comments have not been reviewed by and do not have the concurrence of the National Association of Attorneys General, any Office of Attorney General of any other state, or any other government agency.

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competition in the multichannel video programming industry.² The Commission concluded in 1990, following its probe of the cable television industry, that "[e]nsuring fair and equitable program access is the key to fostering the development of vigorous multichannel competitors to cable." Report in MM Docket 89-600, 5 FCC Rcd 4962 (1990), p. 5021 (hereinafter, "the 1990 Cable Report").

In the 1992 Cable Act, Congress acted on the Commission's recommendations. It enacted proscriptions of practices that Congress determined neither "increase[d] competition and diversity in the multichannel video programming market" nor "spur[red] the development of communications technologies." 1992 Cable Act Section 628(a). The 1992 Cable Act clearly intends to promote competition in the cable market, in accord with the Commission's conclusion.³

The States concur. The Commission's conclusions⁴ indicate that programming inaccessibility significantly jeopardizes competition to cable systems and discourages the development of new technologies. In most cases cable operators are de facto monopolists in their franchises and contiguous areas with the power to secure

2 "It seems fairly clear . . . that vertically integrated MSOs have the ability to limit competition to particular programming services." Report in MM Docket 89-600, 5 FCC Rcd 4962 (1990), p. 5031.

3 "[W]e believe that the public interest in developing competition to the local cable operator justifies . . . targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming." Report in MM Docket 89-600, 5 FCC 4962 (1990), p. 5031.

4 "[T]he record shows that vertically integrated cable operators often have the ability to deny alternative multichannel video programmers access to their vertically owned programming services." "It seems fairly clear from the above facts that vertically integrated MSOs have the ability to limit competition to particular programming services." Report in MM Docket 89-600, 5 FCC Rcd 4962 (1990), pp. 5021 and 5031, respectively.

gatekeeper status.⁵ Competitors to cable, therefore, are either denied programming or are required to purchase the programming at higher rates and on discriminatory terms and conditions.⁶ Competition is excluded, and subscribers and consumers pay higher prices for their multichannel video programming.⁷

The States advocate the promulgation of regulations that will effectively and efficiently redress the prevalent anticompetitive practices that have frustrated competition in the cable industry. The States have been looking at the cable television industry for nearly four years. During this time the States have acquired substantial expertise in the competition issues that face the telecommunications industry. The States share with Congress a desire to expeditiously implement the 1992 Cable Act and provides these comments on issues of mutual concern.

Focal areas for the States' comments are: (1) Congress' intent, among other things, in the 1992 Cable Act is to permit competitors to flourish; (2) Cable operators which own or have a significant interest in video programmers should not be able to prevent their competitors from obtaining access to such programming ("vertical

5 "[P]rogramming is available to SMATV operators only through the local cable operator, which either refuses to provide access to the programming, offers programming at very high prices or offers programming subject to a time-delay requirement." Report in MM Docket 89-600, 5 FCC Rcd 4962 (1990), p. 5024.

6 "[T]he record shows that programming is not available on the same terms and conditions to wireless cable operators as it is to traditional cable operators." Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p. 5015.

7 "[W]here cable systems compete head-to-head, per channel rates for basic services are generally significantly lower than the national average. For example, the average per channel price for the sample of cable systems . . . is 38.2 cents as of May 1990, while the December 31, 1989 national per channel average was 58.0 cents. The national figure is 52 per cent higher." Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p. 5002.

integration"); (3) Cable operators should not be able to use their market power to coerce nonaffiliated programmers to refuse to deal with or discriminate against competitors of cable operators ("undue influence"); (4) Programmers should be required to offer their programming to competitors of cable operators at the same prices and on the same terms as they offer it to cable operators ("price and term discrimination"); (5) Programmers' ability to grant exclusive rights to their programming to cable operators should be closely monitored ("exclusives"); and (6) The complaint process and evidentiary standards should not be burdensome.

II. Intent Of 1992 Cable Act Is To Permit Competitors To Flourish

Several of the Commission's requests for comments concerned the nature of the interests to be protected by the Act. In this regard, the States offer the following comments.

The States respectfully submit that the 1992 Cable Act reflects a Congressional concern with conduct that extends beyond the practices one would expect of vertically integrated firms. Normally, a vertically integrated firm would be expected to act to benefit itself at the expense of its competitors, both vertically integrated and non-vertically integrated. However, Section 628 reflects a concern that any cable programmer, even one owned only in part by a cable operator, may be inclined to conduct its business in ways that favor the cable industry.

Thus, this section of the 1992 Cable Act is concerned with certain conduct by any cable operator and by any programmer that is owned to some extent by any cable operator. 1992 Cable Act Section 628(b). It does not require that the cable operator

who has the interest in the programmer be the same as the cable operator who is engaging in the wrongful conduct or is benefiting from the wrongful conduct. Id. For these reasons, the Commission's regulations should not be limited to conduct that would be pursued only by a vertically integrated company for its own benefit but should also focus on conduct intended to benefit the cable industry at the expense of other distribution technologies.

The Commission should not measure harm under Section 628(b) by determining the amount of programming available to consumers in the relevant market. This subsection is concerned about any distributor's access to programming, not the amount of programming available to a consumer through a cable monopolist. Even though all available programming might be accessible to consumers through the franchised cable company, the subsection is violated if a competing distributor cannot obtain programming as a result of the cable company's unfair business practices. The significant issue is whether the programming is available to distributors, other than the cable franchisee, who have the ability to provide it to consumers.

Furthermore, Section 628(b) is intended to protect distributors from certain types of conduct, when the effect of such conduct is to hinder any distributor's ability to provide programming to consumers. The harm, then, is not measured by the injury to competition, rather it is measured by the injury to any distributor. The statute does not require that a cable operator, who engaging in wrongful acts, conduct business in the same area as the victimized distributor. The States believe, therefore, that an analysis of relevant markets is unnecessary to analyze harm to any individual

distributor. A market analysis would be necessary to measure "harm" or injury to competition, but that is not the standard in the subsection.

The States also believe that the Commission should not exclude entities with limited market share. In most cases a cable operator is a de facto monopolist in its franchise and contiguous area. It has the power to exclude competition, acting as a middleman for programming sales, and, therefore, to set prices for the purchase of programming by consumers.

III. Vertically Integrated Programmers Should Not Favor Cable Operators

Vertical integration between cable operators and programmers has resulted in anticompetitive conduct directed at cable competitors. The Commission found evidence that vertically integrated programmers deny access to their programming to competitors of cable operators. Furthermore, there is evidence that vertically integrated programmers offer less favorable price terms to competitors of cable operators. The Commission should prohibit these practices by vertically integrated entities.

For example, Turner Broadcasting System ("TBS") has admitted that only cable systems and TBS are permitted to distribute TNT and expressly excludes distribution by Multipoint, Multichannel Delivery Systems ("MMDS"). Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p. 5021-22. Additionally, rates are substantially discriminatory. CNN, the TBS-owned news service, sold to MMDS for \$0.50/subscriber, but the top cable rate was \$0.28/subscriber. Nashville Network's rates were \$0.35 for MMDS and \$0.20/subscriber for cable. Report in MM Docket 89-600,

5 FCC Rcd 4692 (1990), p. 5022. This example, while showing how MSOs can use their market power to benefit programmers they own, also indicates the amount of influence they can exert to benefit their own cable operations.

In the 1990 Cable Report, the Commission found significant evidence of vertical integration in the cable television industry. Multiple system operators ("MSOs") were acquiring substantial interests in programming services. Overall, the Commission determined, MSOs had equity interests in 13 of the top 20 national basic cable networks and in six of the eight national pay cable services. Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p. 5007. This trend of vertical integration has increased in recent years. Twenty-one of the 33 programming services launched since passage of the 1984 Cable Act are vertically owned, while only 14 of 37 pre-1984 Cable Act programming services are vertically integrated. Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p.5007-8. Not surprisingly, the vertically owned programming services enjoy significantly higher subscribership. Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p. 5008.

IV. Commission's Rules Must Eliminate MSO "Undue Influence" Over Programmers

Even programmers not affiliated with MSOs apparently have refused to deal with or have discriminated against competitors of MSOs. This anticompetitive conduct is rooted in the MSOs' monopoly power.⁸ Programmers are without the

⁸ "It also appears that most cable operators have the ability to deny or unfairly place conditions on programming service's access to the cable communities they serve This ability reflects some degree of market power in the local video distribution market, which MSOs may leverage on an intermarket basis." Report in MM Docket 89-600, 5 FCC Rcd

benefit of assured carriage by related cable entities and, in order to gain carriage and survive, concede to the "undue influence" exerted by the cable operators.⁹ This conduct, of which the Commission has gathered substantial evidence, is now prohibited by the 1992 Cable Act.

One glaring example of how market power was used to bludgeon concessions from even large unaffiliated programmers was explained by the Commission in the 1990 Report. A provision in CNBC affiliation agreements "was requested, required if you will, by most cable operators that we not enter into general competition with CNN."¹⁰ Nearly 50 percent of CNN's equity is held by MSOs. Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p. 5028 fn. 184. This example, while showing how MSOs can use their market power to benefit programmers they own, also indicates the amount of influence they can exert to benefit their own cable operations.

Other, more common, anticompetitive contract terms found by the Commission that MSOs have required as a condition of carriage include requirements of (1) a financial interest in the programming service, (2) exclusive distribution agreements, (3) programmers refusing to deal with distributors that compete with the cable operator, and (4) unreasonably restrictive agreements not to compete with any

4692 (1990), p. 5031.

9 "[T]he record shows that program services, particularly new program services, have sometimes experienced difficulty obtaining access to cable carriage." Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p. 5021.

10 Testimony of NBC Chairman Robert Wright, Hearings on Media Ownership, Diversity and Concentration, Subcommittee on Commerce, Science and Transportation, United States Senate, 101st Cong., 1st Sess. 609-10 (June 14, 21 and 22, 1989).

programming service in which that multichannel service provider holds a financial interest. Report in MM Docket 89-600, 5 FCC Rcd 4692 (1990), p. 5032.

Additional practices found in the industry that constitute undue influence and should be proscribed include: (1) agreements that the cable operator's prices, terms, or conditions at no time be less favorable than those of a nonaffiliated distributor; (2) terms or conditions that require an alternative distributor to sell programming only in nonwired areas; (3) a requirement that an alternative distributor must attempt to purchase programming from the local cable operator first and deal directly with the programmer only after failure to reach agreement with the cable operator; (4) a requirement that a specified amount of time elapse before an alternative distributor contacts a programmer directly to inquire about purchasing programming; (5) a requirement that a programmer cannot market or make direct TVRO, SMATV, or DBS sales to consumers or subscribers in cabled areas; (6) prices for programming based on factors not reflecting actual costs of delivering such programming to the alternative distributors; and (7) minimum subscriber levels in delivery to consumers via TVRO, SMATV, or MMDS that are not required of cable operators. Each of these contract terms appears to be designed specifically to impede the development of competing distributors.

V. Commission's Rules Must Ban Price and Term Discrimination

The plain language of the 1992 Cable Act supports a prohibition of all price and term discrimination, other than cost-based discounts. Both Sections 616 and 628 prohibit discrimination in the prices, terms, or conditions for carriage of programming.

1992 Cable Act Sections 616(a)(3) and 628(c)(2)(A). Moreover, Section 628(c)(2)(B)(ii) explicitly requires that differences in prices, terms, and conditions take into account actual costs for the creation and delivery of programming. 1992 Cable Act Section 628(c)(2)(B)(i)-(iv).

In order to implement Congress' intent, the Commission should mandate a pricing structure, applicable uniformly to all delivery systems, that reflects actual costs incurred by the programmer in providing programming to the various delivery systems. The States are unaware of any significant costs that would cause pricing structures to differ from technology to technology. Moreover, a uniform pricing structure would increase consumers' access to programming.

Factors such as discounts for prepayment, or marketing allowances, should not be reflected in the pricing structure of programming sales. Discounts for prepayment or allowances for promotional programs that reasonably reflect the value of the service or prepayment may be permissible, if such discounts are reasonably available to all distributors. If they are available to all, there is no discrimination.

The States agree that the volume of programming sold to different types of distributors may be relevant evidence in evaluating whether there has been discrimination. Nonetheless, if a vertically integrated programmer makes its programming available to every MMDS and TVRO except the ones that compete with its cable companies in a few significant markets, the statute has been violated. 1992 Cable Act Section 628(c)(2)(C). The availability of programming in other areas does not help the consumers in the victimized areas. Because of these considerations,

evidence of the volume of programming sold to different types of distributors should never create a presumption of lawfulness.

The Commission should not adopt the Robinson-Patman Act approach to discrimination. Doctrines developed in the context of the sale of "commodities" may not be appropriate to multichannel video programming. Moreover, the "meeting competition" defense developed in the Robinson-Patman context makes little sense where, as here, one programming service may not be perceived as a substitute for another. The experience in the cable television industry suggests that price discrimination is not used to compete against sellers of similar products (which is what the "meeting competition defense envisions); instead price discrimination may be used to prevent competing distributors of "cable" programming from offering a comparable product at a comparable price.

VI. Commission Should Prohibit Most Exclusives

The granting of cable-only exclusives precludes competition and denies programming to subscribers and consumers. This practice has even extended to granting cable-only exclusives in areas where no cable service exists.¹¹ The 1992 Cable Act clearly prohibits the granting of cable-only exclusives in areas unserved by cable operators and appropriately imposes significant limits on their use in cabled areas. 1992 Cable Act Sections 628 (c)(2)(C) and 628(c)(2)(D).

The States concur with the Commission's tentative conclusion that the

¹¹ As noted above, TBS admits that TNT is available for distribution solely through itself or cable operators.

omission of the public interest defense in Section 628(c)(2)(C) is significant, and a per se rule should be applied. Section 628(c)(2)(C) makes unlawful certain conduct which prevents a distributor from obtaining programming for distribution in an area in which a cable operator does not distribute programming. Presumably, in an area in which a cable operator provides services, that programming would be available to consumers from a cable operator, even if it engages in conduct which prevents another distributor from obtaining such programming. However, if no cable operator served that area, then such programming would not be available to consumers. Since one of Congress' goals in passing the Cable Act is to promote the availability of programming, Congress has determined that conduct which makes a program totally unavailable to consumers in an area can never be in the public interest. 1992 Cable Act Section 628 (c)(2)(C). No other interpretation is possible. No other interpretation would be desirable, since it would prevent areas unserved by cable from receiving certain programming under any circumstances.

The States recommend that the determination of what constitutes an "area" should depend on whether the programming in question is available to consumers in that area from the cable franchisee. If a consumer resides in an area not served by the cable operator and another distributor cannot obtain the programming to make it available to that consumer, then Section 628(c)(2)(C) has been violated. Because Subsections 628(c)(2)(C) and 628(c)(2)(D) discuss "areas served" and "areas not served" "by a cable operator," any analysis of areas served or not served by other types of distributors is irrelevant.

Congress also intended to ban cable-only exclusives in areas served by cable operators unless such exclusives were in the public interest. 1992 Cable Act Section 628(c)(2)(D). Exclusives granted to cable operators in the areas they actually serve are presumed to be against the public interest, subject to refutation by the parties seeking to enforce them. The States urge that parties seeking to enforce cable-only exclusives must make a positive showing that the exclusive in question does not preclude effective competition between cable operators and other distributors of multichannel video programming.

VII. Enforcement Process Must Be Simple

The States urge the adoption of a complaint process that is not so burdensome that it would foreclose enforcement of the 1992 Cable Act before it begins. This is in accord with the Section 616(a)(4) mandate that the Commission "provide for expedited review of any complaints (emphasis added)." 1992 Cable Act Section 616(a)(4).

To require that a complainant establish a prima facie case at the onset, without the benefit of discovery, contravenes the Congressional intent and would provide for little or no enforcement. The complainant will not have the power to subpoena documents or witnesses in advance of filing the complaint. All he/she may have is hearsay or circumstantial evidence of wrongful conduct. Similarly, to require a complaint to show that the alleged discrimination is unjust or unreasonable would be an overwhelming burden. First, it is always more difficult to prove the negative than the positive. Second, a complainant may not have evidence of the motive and

purpose of the alleged wrongdoer. Even more, without the power to obtain discovery, the complainant will be unable to obtain such evidence.

The States urge that a complaint by a cable competitor that provides substantial evidence that the 1992 Cable Act has been violated establishes a sufficient basis for a review and ruling by the Commission. Substantial evidence would include, but would not be limited to, the following: (1) the competitor has been denied programming, (2) the competitor has complied with or offered to comply with reasonable requests from the programmer, (3) the price or other terms of the programming available to the competitor are different from those offered to the cable operator, and (4) the programming contract contains any anticompetitive terms discussed herein, or any other terms which have the "effect" of significantly hindering or preventing programming availability.

At that point, the alleged wrongdoer would be required to rebut a presumption of discrimination by showing such conduct was just or reasonable. The burden of producing legitimate business reasons for denying access to the desired programming will then be on the programmer. Legitimate reasons for refusal to deal with a competitor of cable should be limited to compliance with the same business justifications required of a cable operator. As to price and term discrimination, the only discrimination permitted in these circumstances will be cost-based volume discounts.

The States strongly encourage the use of Alternative Dispute Resolutions ("ADR") as one available means of resolving disputes. ADR can be a viable method

of dispute resolution. The Commission should keep in mind that ADR is strictly voluntary and the parties can agree on any process that will assist in resolution of the dispute, including discovery. However, if discovery can be compelled in ADR, a party may not want to participate in the process.

VIII. Conclusion

To effect competition, the States recommend that the Commission prohibit:

1. Any programming service in which a cable operator holds a cognizable interest from unreasonably refusing to deal with competitors to cable operators;
2. Cable operators from conditioning carriage of programming on their cable systems on the existence of certain terms in the contract which harm their competitors;
3. Programmers from discriminating against competitors of cable operators in the price and terms on which programming is offered to them; and
4. Programmers from granting exclusives to cable operators in most circumstances.

These recommendations are similar to those made by the Commission in its 1990 Cable Report to the Congress and which were accepted when Congress enacted the 1992 Cable Act. The Commission should avail itself of the opportunity Congress has presented and implement its recommendations.

Respectfully submitted,

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